IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 601

ERIE FORGE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of April 21, 1952, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in the above entitled case as prayed for in the petition filed February 21, 1952, herein.

Reasons for Granting Rehearing and Issuing the Writ

The net effect of the instant case to date is the creation of a preferred standard for the sovereign in tax controversies—the government may subsequently relitigate in the Federal Court the same claim previously in controversy before the Tax Court, while the taxpayer, however, is confined solely to the Tax Court.

With all due deference we submit that not only is such a result specifically contrary to the law as enacted by Congress and determined by the courts but is likewise contrary to the entire spirit of the law. Certainly the taxpayer may not institute or prosecute an action in the Federal Court for any tax year after having resorted to the Tax Court. Apart from the doctrine of *res judicata* it has been held that the taxpayer is precluded from resorting to any other forum inasmuch as the Tax Court is the exclusive forum for the determination of every matter of tax liability relating to the year in question—whether litigated or not. "It is not the decision which the Tax Court makes but the fact that the taxpayer has resorted to that court which ends his opportunity to litigate in the District Court his tax liability for the year in question. * * * Its decision determined finally, unless reversed upon appeal, the amount of the plaintiffs' 1938 income tax." *Elbert* v. *Johnson*, 164 F. 2d 421, 424 (2 Cir., 1947). The Court further stated that it was immaterial whether the issue sought to be litigated was presented or not, or even could not have been presented.

Indeed, in the *Elbert* case the Tax Court had held that it had no jurisdiction to determine the matter concerning which the suit in the District Court was later brought. In other words the rule limiting the taxpayer to the Tax Court was sharply invoked even though the Federal Court action seemed meritorious. In the case at bar, however, the Court below admitted that the Tax Court had jurisdiction but stated that it had not exercised the same.

Before proceeding further with the authorities it is important to inquire into the status of the instant case. The Court below vacated the order of the District Court dismissing the action and remanded the cause for proceedings not inconsistent with its opinion. In its opinion, however,

the Court of Appeals held that the Tax Court decision was not *res judicata*. Is that the law of the case and is the taxpayer deprived of his right to assert and prove that the penalty was in fact as well as in law adjudicated by the Tax Court? In the light of the government's stand to date it appears that it will urge that not only has the taxpayer lost such right but the government itself may invoke the doctrine of *res judicata* by claiming that the determination of the Tax Court with respect to the delinquency penalty was a decision against the taxpayer on the merits as to that portion of the penalty on which the instant District Court action has been brought. It is apparent therefore that further involved litigation will ensue because there has been denied that finality to the determination of the Tax Court which from its inception its decisions have been accorded.

In our main brief we set forth only a portion of the Senate Finance Committee report relating to the finality of the Tax Court and omitted therefrom certain portions which perhaps may be helpful in further considering the matter:

> "Under the existing law, after the Commissioner has determined the deficiency and mailed notice thereof to the taxpayer, the taxpayer may appeal to the Board of Tax Appeals; but if the Board finds that there is a deficiency, the taxpayer must pay the tax and proceed before the Department and the Courts for a refund. The House Bill institutes a system of appeals from the decisions of the Board to the Circuit Courts of Appeals and from there on certiorari to the Supreme Court. The House Bill also provides in Section 281(d) that when the deficiency letter has been sent to the taxpayer, whether or not he takes the case to the Board of Tax Appeals, his right to sue for a refund for the year to which the deficiency letter relates is forever

barred. This provision seems to the Committee too drastic, and it is accordingly proposed in Section 284(d) of the Bill that the taxpayer's right to claim and sue for a refund shall be barred only if he takes the case to the Board, thus preserving to him the option of paying the tax and then proceeding before the Department and the Courts to recover any excess payments by a claim or suit for refund.

"But if he does elect to file a petition with the Board, his entire tax liability for the year in question (except in case of fraud) is finally and completely settled by the decision of the Board when it has become final, whether the decision is by finding of facts and opinion or by dismissal, as in the case of lack of prosecution, insufficiency of evidence to sustain the petition, or on the taxpayer's own motion. *The duty of the Commissioner to assess the deficiency thus determined is mandatory;* and no matter how meritorious a claim for abatement of the assessment or for refund, he cannot entertain it, nor can suit be maintained against the United States or the Collector. *Finality is the end sought to be obtained by these provisions of the Bill; and the Committee is convinced that to allow the reopening of the tax for the year involved, either by the taxpayer or by the Commissioner (save in the sole case of fraud), would be highly undesirable.* * * * *It is the purpose of the Bill that all questions arising prior to the time the decision of the Board has been rendered as to the right of the Commissioner to assess and collect the tax,* including the question as to whether or not the statute of limitations has run before the mailing of the deficiency letter, *shall be determined by the Board and by the Courts on appeal from the Board.* * * * Under the existing law, if the Commissioner decides to collect a deficiency greater than the amount determined by the Board, he may bring suit against the taxpayer, in which suit the findings of

> the Board shall be *prima facie* evidence. *The House Bill takes away this right and confines the Commissioner to an appeal from the Board to the Circuit Court of Appeals, and from there by certiorari to the Supreme Court. The Committee concurs in this provision.*" (Italics ours.)

Senate Finance Committee Report No. 52 (69th Cong., 1st Sess.) on the Revenue Bill of 1926, 1939—1 C. B. (Part 2), pp. 351-352.

The Courts have consistently upheld the Congressional policy as set forth in the above quoted report.

In the case of *Guettel* v. *U. S.*, 95 F. 2d 229 (8 Cir., 1938), *cert. den.*, 305 U. S. 603, 59 S. Ct. 64, after citing various decisions of this Honorable Court it was held that claims could not be split and prosecuted piece-meal, that the rule of *res judicata* applied to tax cases to the same extent as other cases, and that even though the claim sought to be advanced in the second action had not been urged in the court below, the rule of *res judicata* was nonetheless applicable. At page 232:

> "The rule of res judicata is based upon that public policy which requires that a single controversy which is capable of being completely determined in one suit shall be ended by the judgment in that suit, and shall not become the subject matter of subsequent litigation. See *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1, 48, 18 S. Ct. 18, 42 L. Ed. 355. '*The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the law-making body rather than the courts.*' *Tait* v. *Western Maryland Ry. Co.*, supra, 289 U. S. 620, 624, 53 S. Ct. 706, 707, 77 L. Ed. 1405." * * * (Italics ours.)

> "'To hold, therefore, that the conclusive effect of a judgment either as an estoppel or as a merger or bar may be escaped by showing even justifiable ignorance of the existence of facts or evidence which might otherwise have been presented, or of other grounds upon which an omitted or rejected claim might have been sustained, is a clear violation of the fundamental policy and purpose of the doctrines of res judicata and collateral attack.' Freeman on Judgments, 5th Ed., Vol. 2, §553, p. 1178."

Further evidence of the finality of the Tax Court decision is shown in cases dealing with attempts by both the sovereign and citizen to get out from under the overall binding determination of said court. The case of *Cook* v. *United States,* 108 F. 2d 804, 806 (5 Cir., 1940) held:

> "The provisions of law concerning the Board show that it is, when appealed to by a taxpayer, to have full and unimpeded authority to redetermine the taxes for the tax year, and its decision is to be final, subject to the review allowed by the Circuit Court of Appeals. The taxpayer who elects to invoke the jurisdiction of the court accepts this consequence."

The Court of Appeals for the Second Circuit in *Elbert* v. *Johnson,* 164 F. 2d 421, 424, *supra,* expresses it even more strongly. There mere resort to the Tax Court concluded the taxpayer.

The scope of this doctrine is also set forth in *Lehigh Valley Trust Co.* v. *United States,* 34 F. Supp. 839 (D. C. East. Pa., 1939). There it appeared that the question was not adjudicated by the Board because the question was never presented. Nevertheless, the order of the Board was final and was considered to have conclusively disposed of all matters even those not litigated.

Is the government equally bound by the Tax Court decision? Happily the answer is yes. Just as the taxpayer could not worm out of his position in the *Cook* case, *supra*, neither may the government. *Ross Bowman*, 17 T.C. 681 (1951), our main brief, 19, 24. In other words the law in action has recognized and applied the principles of equality so universally accepted by our system of jurisprudence.

Before leaving the matter we should like again to refer to the so-called "windfall" argument of the government. It appears that even supporters of our position (5 Tax Law Review, November 1949, pp. 58, 61) fall into the same error.

The argument has been that the taxpayer really lost the case on the merits in the Tax Court and is now trying to preserve a windfall. Nothing could be further from the fact. It has been the taxpayer's position from the beginning that the delay for late filing was completely excusable and should have been so found by the Tax Court, that the Tax Court erred but inasmuch as the error was not too serious from a financial viewpoint, the taxpayer did not appeal. After all no one's character or integrity was besmirched requiring vindication; it was simply a matter of dollars and cents. Had the Tax Court erred in the full amount of the potential penalty, namely the aggregate amount of the penalty determined by the Tax Court and also the amount subsequently and collaterally in issue in this very case, then the taxpayer most assuredly would have appealed to the Circuit Court from such determination. Good trial strategy on the part of the taxpayer in the actual state of the litigation in the Tax Court might have influenced the taxpayer's presentation of its case on the issue of late filing and penalty therefor. In other words realizing perhaps that at most only a portion of the penalty could be imposed, the taxpayer might have re-

frained from presenting its case in full. Had the taxpayer won there would have been no further litigation; if it lost its liability was ceilinged. While we do not ask this Court to say why the taxpayer or for that matter the government did what it did, we do ask that the taxpayer not be prejudiced by statements not based upon fact but mere speculation.

CONCLUSION

Finally, if there should be such a radical departure from Congressional enactments, judicial determinations and administrative practice, may not such change be made only by Congress rather than the courts; but granting perhaps that such change may be made by the courts ought not such action be taken only after a full and complete hearing, for which reason we respectfully seek a rehearing in connection with the order denying our petition for certiorari.

Respectfully submitted,

LEO BRADY,

W. PITT GIFFORD,
Attorneys for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

LEO BRADY,
Counsel for Petitioner.